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Supreme Court, U.S.
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No. 08-1178 MAR 19 2009

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IN THE

Supreme Court of the United States

DONNA REID, as Personal Representative of the Estate of JONATHAN MERLINO, deceased, and HELEN KEARNS, as Personal Representative of the Estate of ERIC SCOTT KEARNS, deceased,

Petitioners,

v.

NEW HAMPSHIRE INDEMNITY COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the District's Court's Summary Judgment entered in favor of Respondent, New Hampshire Indemnity Company ("NHIC").

This case arises out of a one vehicle accident that occurred on January 5, 2000, in Flagler County, Florida. In that accident, 20 year old Eric Scott Kearns and 19 year old Jonathan Merlino were killed. A judgment was entered against the driver, Jeffrey B. Anderson, Jr. in state court for $6,500,000.00 for the deaths of these two young men. NHIC subsequently filed an action for declaratory judgment to determine whether Anderson Jr. was an insured under a NHIC policy issued to Anderson Jr.'s parents. The District Court ruled as a matter of law that Jeffrey Bruce Anderson, Jr. was not insured under the NHIC policy because he was not a "resident" of his parents' "household" for purposed of coverage as a "family member".

Two questions are presented:

1. Was Summary Judgment properly granted and affirmed pursuant to Fed.R.Civ.P. 56 when the record was replete with facts that should have been presented to a jury, where there were facts presented from which a fair-minded jury could return a verdict for Petitioners.

2. Whether the Court below failed to afford "full faith and credit" to the prior ruling of the decisions made by the Appellate Courts of the State of Florida, where Florida law governed the issues in the case. 28 U.S.C. section 1652. United States Constitution, Article 4 Section 1.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is not reported, but is attached in the Appendix. (App. A) The opinion of the United States District Court, Middle District of Florida Jacksonville Division, is reported at 2007 WL 473677 (M.D. Fla.). (App. B)

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the District Court was handed down on September 19, 2008. A timely petition for rehearing was filed on October 9, 2008. The Petition for Rehearing was denied on December 19, 2008. (App. C) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Fed. R. Civ. P. 56(c):

> The Judgment sought should be rendered if the pleadings, the discovery, and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movement is entitled to judgment as a matter of law.

United States Constitution, Article 4 Section 1:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceeding of every other state. And the Congress may by general laws prescribe the manner in which those acts, records, and proceeds shall be proved and the effect thereof.

28 U.S.C. § 1652 (State laws as rules of decision):

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This case arises out of a motor vehicle accident that occurred on January 5, 2000 in Flagler County, Florida, (hereinafter "the accident"). Jeffrey Bruce Anderson, Jr. (hereinafter "Anderson Jr.") was operating a motor vehicle wherein 19 year old Jonathan Merlino and 20 year old Eric Scott Kearns were passengers. In a one vehicle accident, Eric Kearns and Jonathan Merlino were killed.

A lawsuit was originally filed in Flagler County, Florida for wrongful death. The lawsuit was brought by the young mens' mothers, Donna Reid, as personal representative of the estate of Jonathan Merlino,

deceased (hereinafter "Donna Reid") and Helen Kearns, as personal representative of the estate of Eric Scott Kearns, deceased (hereinafter "Helen Kearns") against Anderson Jr. and Juan Quiles (hereinafter "Quiles"). Quiles owned the motor vehicle driven by Anderson Jr. at the time of the accident, and was sued pursuant to Florida's dangerous instrumentality doctrine.

New Hampshire Indemnity Company (hereinafter "NHIC") was notified of the claim. NHIC elected not to provide a defense to any party. Thereafter, judgment was entered in favor of Donna Reid and Helen Kearn against Anderson Jr. and Quiles in the amount of $6,500,000.00.

After entry of judgment, NHIC filed an action for Declaratory Judgment in the United States District Court, Middle District of Florida, Jacksonville Division. Jurisdiction was predicated upon diversity of citizenship, 28 U.S.C. § 1332. NHIC sought a determination from the District Court as to whether the tortfeasor, Anderson Jr., was covered under the NHIC policy that was issued to Anderson Jr's parents, Christine Anderson and Jeffrey Anderson Sr. The District Court granted Summary Judgment in favor of NHIC, finding that there was no coverage.

The United States Court of Appeals of the Eleventh Circuit Affirmed the District Court's decision.

The sole issue in the case is whether Anderson Jr. qualified as a "family member" as used in the NHIC policy. The NHIC policy's definition of a family member is: "a person related to you by blood, marriage, or adoption who is a resident of your household."

Procedurally, the district court entered summary judgment pursuant to FRCP 56. A judgment should not be entered pursuant to Rule 56 "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial - whether, in other words, there are any genuine factual issues that properly can be resolved only by finder of fact because they may reasonably be resolved in favor of either party." *Id.*

Taking the facts most favorable to Donna Reid and Helen Kearns, the Anderson family moved to Palm Coast, Florida in 1991. Anderson Jr. lived with his parents at their house free of charge at 87 Belvedere in Palm Coast, Florida from 1991 to April 1999.[1]

There was no question but that reasonable juries could find that Anderson Jr. was a resident of his parents household at least until April 1999.[2]

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1. There was evidence that Anderson Jr. lived briefly with relatives in Massachusetts in 1998. Taking facts the most favorable to the non-moving party, that brief excursion to Massachusetts was about two months. There also was testimony that Anderson Jr. lived briefly in a trailer in 1997 that he allegedly bought for $2,500.00. Anderson Jr., however, received that money as part of a settlement for his father's medical malpractice case, so it represents compensation for Anderson Jr.'s loss of his father's services. Moreover, the Department of Motor Vehicles have no record of Anderson Jr. ever buying a trailer.

2. The Eleventh Circuit's order denying the appeal in fact focused on Anderson Jr.'s status after he moved into the duplex.

In April 1999, Anderson Jr. moved into 25B Braddock Lane, Palm Coast, Florida. 25B Braddock Lane was a duplex owned by Anderson Jr.'s parents. It was 9/10's of a mile away from the parents house at 87 Belvedere Lane.

Anderson Jr. had two roommates. Anderson Jr. and each roommate should have paid $200.00 per month for a total of $600.00 for rent. Anderson Jr. testified that his payment of rent to his parents was dependant upon his employment situation.

Taking the facts most favorable to the non-moving party, Anderson Jr. was unemployed almost the entire time that he lived in 25B Braddock Lane, from April 1999 through the January 2000 accident.[3]

Accordingly, a reasonable jury could conclude that Anderson Jr. lived at his parents' duplex for free the entire time he was there. The evidence is undisputed that Anderson Jr.'s parents never threatened to evict him for nonpayment of rent, but rather told him to "straighten up" his life.

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3. Anderson Jr. testified that he was paid full-time employment wages from the time that he moved into 25B Braddock through July 1999 by Top Of The Line Concrete. Top Of The Line Concrete's representative signed an affidavit saying that he had only worked for them for a few days. His tax return for 1999 only showed income of $3,407.01. Anderson Jr.'s roommate, Juan Quiles, moved into 25B Braddock in September 1999, and he testified that to his knowledge Anderson Jr. only worked two days leading up to the accident. His other roommate, Danny Dosantos, testified that Anderson Jr. never worked after an injury that Anderson Jr. sustained in May until the accident.

Anderson Jr. testified that he was a typical 21-22 year old. If he mades $200.00, he would normally spend it on the weekend, then would have to borrow money after he had spent it.

The 25B Braddock duplex therefore was available to the Anderson family members as a place to stay for free.

Not only did Anderson Jr.'s parents provide him with a free place to live, but they also gave him between $10.00 and $20.00 per week. This money was for necessaries like food, and there was no expectation that the money would ever be repaid.

The record also showed evidence of a close relationship between Anderson Jr. and his parents' residence at 87 Belvedere. Donna Reid was at the 87 Belvedere address at least four times a week in the relevant time frame, and she indicated that Anderson Jr. was there 90% of the time. He made free use of the entire house, including using the swimming pool, kitchen, watching television, or otherwise just "hanging around". He kept a basket of old toys at the house. He contributed to his parents' household by performing work at 87 Belvedere, such as lawn maintenance, cleaning the pool, etc. He drove his mother's van. He could enter and exit 87 Belvedere at any time he wanted.[4]

Christine Anderson performed Anderson Jr.'s laundry. The ambulance report for Anderson Jr. before

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4. Although the testimony is mixed as to whether he had a key, the testimony was that his father was always home due to a stroke, so Anderson Jr. had free access to the home.

the subject motor vehicle accident in January 2000 references 87 Belvedere as the home address. There were occasions where Anderson Jr. spent the night at 87 Belvedere.

After the subject motor vehicle accident, Anderson Jr. moved back into his parents' house at 87 Belvedere. Again taking evidence most favorable to the non-moving party, Anderson Jr. stayed at 87 Belvedere at least through May 2000.

Moreover, Anderson Jr. was arrested in September 1999 for distribution of methamphetamine. His mother posted a $10,000.00 bond for his release.

Federal jurisdiction in the District Court was established by diversity of citizenship. The District Court, as well of the Eleventh Circuit Court of Appeal, were required to decide the case based on state law. 28 U.S.C. § 1652.

Under Florida Law, ambiguities are interpreted liberally in favor of the insured and strictly against the insurer that prepared the policy. *Travelers Indemnity Company v. OCR Incorporated*, 889 So.2d 779 (Fla. 2004). Where policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. *State Farm Fire and Casualty v. CTC Development Corporation*, 720 So.2d 1072 (Fla. 1998).

The term "household" is not definied in the NHIC policy, and therefore must be construed broadly and liberally.

There are several appellate decisions in the State of Florida addressing sufficiency of evidence for whether a relative is considered a member of the insured's "household" for insurance purposes. The law is well settled in Florida that a resident need not reside at the same physical address as the insured:

> Although this definition of household might seem to require living together in a single dwelling, it has been recognized by the policy term "household" may also be defined to include one who is not, at the time of the accident, physically living within the same structure as the named insured. *Row v. United Services Automobile Association*, 474 So.2d 348 (Fla. 1st DCA, 1985).

The term "household" focuses more on the concept of a family unit, rather than a physical address. "Resident of your household" includes a "variety of family arrangements which extend beyond the physical parameters of the house." "Household includes numerous family members of a poor family who are continually transient and mutually dependant." *Alava v. Allstate Insurance Company*, 497 So.2d 1286 (Fla. 3rd DCA, 1986), citing *USF&G v. Williams*, 375 So.2d 328 (Fla. 1st DCA, 1979).

One case that was cited heavily below was the *Row* decision, *supra*. Mark Row lived in an apartment owned by Row's father. The apartment that Row lived in was a unit that was separate from where his father lived, although they did both live in the same apartment complex.

Just like Anderson Jr., Row did not pay rent to his father. Row's and Anderson Jr.'s parents essentially supported them. Also, Row spent a great deal of time at his father's apartment, and would often eat there, do his laundry there, socialize, etc. These facts have a great deal of parallel with Anderson Jr.'s living arrangements with his parents.

In *Row*, the trail court heard testimony and ruled *as a trier of fact* that Row was not a member of his father's household for purposes of coverage. The Fifth District Court of Appeal for the State of Florida reversed this decision with instruction to enter judgment as a matter of law in favor of Row, finding coverage.

The Appellate Court therefore found that the facts were so strong that, as a matter of law, Row was to be considered a member of his father's household.

By contrast, the District Court found in the above captioned matter that there is not even enough evidence in Anderson Jr.'s case to present the facts to a jury. The appellate court affirmed.

In *General Guarantee Insurance v. Broxsie*, 239 So.2d 595 (Fla. 1st DCA, 1970), plaintiff claimed coverage under her aunt's policy. Her aunt live in Monticello, Florida, while plaintiff attended school, in Thomasville, Georgia. Plaintiff lived for about a year before the subject accident in a rented room in Thomasville, Georgia. Broxsie testified that upon graduation it was her intention of accepting employment in Thomasville and not to return to live with her aunt. The trial Court ruled as a matter of law under these undisputed facts that Broxsie was still a resident of a aunt's household.

In *Patterson v. Cincinnati Insurance Company*, 564 So.2d 1149 (Fla. 1st DCA, 1990), Melissa Patterson was injured while riding a bicycle. She resided at an apartment in Fort Lauderdale rented by her father. Her father was not living at the apartment at the time of the accident, but was rather living in Gulf Breeze. The record evidence was that her father had lived at the apartment in Fort Lauderdale, but was not at the time of the accident. The court ruled under those circumstances that there was an issue of fact for the jury as to whether Melissa was a member of her father's household.

> Although case law demonstrates that it is not essential that the insured and the person claiming under the insured's policy actually live within the same structure, when the evidence may point in either direction, as in the case at bar, then it is for the trier of fact to decide the residency issue, not the court.

Patterson, at 3. (Other citations omitted.)

In *State Farm Mutual Auto Insurance v. Johnson*, 536 So.2d 1089 (Fla. 5th DCA), Russell Johnson was involved in a motor vehicle accident. He sought coverage under his father's State Farm policy. At the time of the accident, Russell Johnson resided at 529 Putnam Road, which he occupied with a one-year lease. Previously, he had lived with his parents on Lytal Court. After moving into Putnam Road, he continued to receive his mail at his parents' house, received his messages there, had a key to his parents' house, and had free reign of the parents' home. The jury found in favor of coverage, and

the District Court of Appeal upheld a judgment in favor of coverage based on that verdict.

In *Johnson*, the injured party actually had a lease at an entirely different residence than his parents'. The reasonable reading of the *State Farm v. Johnson* opinion is that Russell's one-year lease was with someone other than his parents. The opinion also does not say anywhere that his parents paid for his rent, at least creating an inference that Russell Johnson paid his own rent.

By contrast, Anderson Jr. did not have a lease with his parents. He was living at 25B Braddock for free. With no written lease, he could leave any time he wanted. This was hardly the normal landlord-tenant relationship.

In *Southerland v. Glens Falls Insurance*, 493 So.2d 87 (Fla. 4th DCA, 1986), the insureds' son had moved into his own apartment. His mother, however, paid his rent prior to the accident. The record evidence was that Southerland spent as much time with his parents as at his own apartment. The court held that Southerland was "testing the waters", and felt that there was sufficient evidence for a jury to find coverage.

In the case before this Court, Anderson Jr. did not move into an apartment owned by a stranger with a lease. Rather, he moved into a house owned by his parents where he received support and was relieved of responsibility of paying for rent.

REASONS FOR GRANTING THE PETITION

Under Fed.Rules Civ. Proc. Rule 56, Summary Judgment can only be granted when there is no genuine issue of material fact.

> [I]t is clear enough from recent cases that at the Summary Judgment stage the Judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As (citation omitted) indicate, there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby Inc*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed. 2d 202 (1986).
>
> The inquiry preformed is the threshold inquiry of determining whether there is the need for a trial— whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. *Id.*
>
> If the defendant in a run of the mill civil case moves for Summary Judgment or for a directed verdict based on the lack of proof of a material fact, the Judge must ask himself not whether he thinks the evidence unmistakenly favors one side or the other but whether a fair mined jury could return a verdict for the plaintiff on the evidence presented. *Id.*

The district court's Summary Judgment and the Eleventh Circuit approval are in conflict with the Court's parameters for summary judgment identified in *Anderson*. The facts of the pending case have many of the factual elements in common with the Appellate Court decisions issued by the Courts of the State of Florida.

For example, Anderson Jr. and Mark Row both lived in physical addresses separate and apart from their parents, but lived in those units without paying any rent, and were basically supported by their parents. In Row, the First District Court of Appeals for Florida reversed a verdict of no coverage, with directions to enter judgment in favor of coverage.

In the case of bar, the District Court and Eleventh Circuit have found the exact opposite, upholding Summary Judgment that there was no coverage on similar facts as were found in *Row*.

The District Court and the Circuit Court of Appeals are both required to follow state law decisions under these circumstances. 28 U.S.C. § 1652.

> Under the *swift* doctrine, Federal Courts assumed the power in diversity suits to decide issues of common law, such as tort principles or the interpretation of contracts. (Citation omitted) *Erie* repudiated this doctrine and held that state decisional law is entitled to respect equal to that accorded to state statutes. (Citations omitted) Neither Congress nor the Federal Judiciary has the Constructional power to declare a substantive rule of common law for the states. *Olympic Sports Products v.*

Universal Athletic Sales, 760 F.2d 910 (9th Cir. 1985, citing *Erie Railroad v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188(1938).

The Summary Judgment at Bar so far exceeds Florida law as to depart from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this Court's advisory power. U.S. Supreme Court Rule 10(a). The facts before this Court parallel facts considered in controlling state court decisions, yet the District Court and Eleventh Circuit reach the exact opposite outcome.[5]

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5. The Tenth Circuit Court of Appeals recently summarized the effect of state intermediate appellate courts on U.S. District Courts of Appeals:

> "When the federal courts are called upon to interpret state law, the federal court must look to the rulings of the highest state court, and, if no such rulings exist, must endeavor to predict how that high court would rule." *Johnson v. Riddle*, 305 F.3d 1107, 1118 (10th Cir. 2002). "If there be no decision by that court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Id.* at 1119 quoting *Comm'r of Inter Revenue v. Bosch's Estate*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). The decision of an intermediate appellate state court "is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S. Ct. 179, 85 L. Ed 139 (1940).

Folks v. State Farm Mutual Insurance Company, 299 Fed.Appx. 748, 757 (10th Cir. 2008).

In *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958), Plaintiff brought a personal injury case against Blue Ridge Rural Electric Cooperative. Blue Ridge defended on the bases of workers' compensation immunity, which was controlled by a South Carolina Statute. The immunity turned on whether plaintiff was an employee as defined in the South Carolina Statute.

The trial court initially struck the affirmative defense, finding as a matter of law that plaintiff was not a statutory employee for purposes of South Carolina's Statute.[6]

The Court of Appeals disagreed with the District Court, and held that as a matter of law the plaintiff was an employee of Blue Ridge, and therefore directed that judgment be entered for Rural Electric on the immunity issue.

The United States Supreme Court *took jurisdiction of the matter,* and overruled the trial Court and the Court of Appeals. The Supreme Court noted that the South Carolina standard for employee and immunity have "no particular formula by which to determine whether an owner is a statutory employer. . ."

> (W)hile the language of the statute is plain and unambiguous, there are so many different

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6. Note that the defense was stricken at the end of presenting evidence, which is the equivalent of a directed verdict on that issue. A directed verdict and summary judgment involved the same standard of review. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986).

> factual situations which may arise that no easily applied formula can be laid down for the determination of all cases. In other words, 'it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designations of the statute. It is in each case largely a question of degree in and of fact.' *Byrd*, citing *Smith v. Farmer*, 198 S.C. 91, 97, 15, S.E. 2d 681, 683.

United States Supreme Court therefore reversed the trial Court and the Appellate Court with directions that the matter be tried, and that a jury decide the critical factual issue.

Similarity, the question of whether Anderson Jr. was a member of his parents' "household" is not subject to a simple or easy definition. As referenced in the state appellate decision, it is extremely fact sensitive. The matter therefore should be submitted to a jury.

The Supreme Court of the United States took certiorari of an erroneous decision based on state law in *Magenau v. Aetna Freight Lines*, 360 U.S. 273, 79 S. Ct. 1184, 3 L. Ed. 1224 (1969). This case also involved interpretation of a state workers' comp statute, finding that when the facts were susceptible to a finding for either party, the evidence should have been submitted to a jury in a trial.

Again, the facts in the case at Bar are very similar to Florida decisions where the Appellate Courts have ruled that there are sufficient facts upon which a jury could find coverage. In *Patterson, supra*, Plaintiff lived

in her father's apartment in Fort Lauderdale while her father lived in Golf Breeze. Even though they lived in separate places, there was enough for a jury to decide that Ms. Patterson was a resident of her father's household. Similarly, Anderson Jr. lived for free in his parents' duplex located 9/10th of a mile away from their principal place of residence.

In *State Farm v. Johnson*, *supra*, plaintiff lived in a house that he leased from an unrelated third party, yet still was considered a member of his parents' household because he was at his parents' house on a frequent bases. In this instance, Anderson Jr. lived in a house for free that his parents owned, and also had similar ties to his parents' household.

In *Southerlin v. Glen Falls*, *supra*, the alleged insured lived in an apartment separate from his mother, while his mother paid for his rent. The insured spent a great deal of time at his mother's house. Again, Anderson Jr. lived in a house for free that his parents owned, and yet the Eleventh Circuit Court of Appeals and District Court found that there is no possibility that he could be considered a part of his parents' household.

The Supreme Court of Florida has ruled that when policy language is subject to differing interpretations, the term should be construed liberally in favor of the insured and strictly against the insurer. *State Farm v. CTC Development*, *supra*. The District Court's decision approved by the Eleventh Circuit Court forces a narrow interpretation on the NHIC policy.

The District Court and Eleventh Circuit Court of Appeals opinion at bar do not merely contradict the state opinions: they contravene the states decisions to the point that they violate the *Erie* Doctrine, and 28 U.S.C. § 1652. It arises to a departure from the accepted and usual course of judicial proceedings as contemplated in U. S. Supreme Court Rule 10(a).

The decisions before the Court also violate the standards expressed by the United States Supreme Court for Rule 56 governing summary judgment. The Supreme Court has taken jurisdiction to correct misapplications of the rules of civil procedure. (*See, e.g., Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964).)

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, and an Order reversing the Summary Judgment below with directions to remand to the District Court for trial by jury.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 19, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-11731

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff-Counter-
Defendant-Appellee,

v.

DONNA REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased,

Defendants-Counter-
Claimants-Appellants.

(September 19, 2008)

Before ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

After oral argument and careful consideration, we conclude that the judgment of the district court is due to be affirmed. We have carefully reviewed the relevant

Florida case law, and have compared the instant facts against the facts in those cases. We conclude that a reasonable jury would have to conclude under the facts of this case, and in light of the Florida case law, that Anderson, Jr. had moved out of his parents' home and was living apart in the duplex. The fact that he was receiving some financial support from his parents is not alone sufficient to make him a member of the family under the policy and the case law.

AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION DATED FEBRUARY 7, 2007 AND FILED FEBRUARY 8, 2007

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CASE NO.: 3:05-CV-1280-J-12MCR

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff,

vs.

Donna REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased, JOHN P. MERLINO, JEFFREY BRUCE ANDERSON, JR., and JUAN QUILES, III,

Defendants.

OPINION AND ORDER

This case comes before the Court on Plaintiff's Motion for Summary Judgment (Doc.72) requesting a determination on its Complaint for Declaratory Relief (Doc.1) that Jeffrey Bruce Anderson, Jr. (Anderson, Jr.) is not an insured under the New Hampshire Indemnity Company, Inc. (NHIC) policy of insurance issued to his

father, Jeffrey B. Anderson, Sr. (Anderson, Sr.), as the named insured. Plaintiff asserts that Anderson, Jr. was not a covered resident member of the household of Anderson, Sr. and his wife (Anderson, Jr.'s mother), Christine Anderson (the Andersons), on January 5, 2000, when he was involved in a fatal car accident.[1] Defendants, Donna Reid (Donna Reid Lunsford) and Helen Kearns, the representatives of the estates of the two young men killed in the accident, filed a memorandum in opposition to the motion for summary judgment (Doc.73). These two Defendants obtained a Final Judgment (Doc.73, Exh.4) against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III, in the amount of $3,000,000.00 each. That Final Judgment also awarded John P. Merlino $500,000.00 against Jeffrey Bruce Anderson, Jr. and Juan Quiles, III. Following oral argument by the parties and after considering the facts, evidence, and law applicable to this matter, the Court will grant Plaintiff's Motion for Summary Judgment for the reasons set forth below.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of a material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden is on the moving party

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1. The ruling on Plaintiff's Motion for Summary Judgment also resolves the Defendants' Counterclaim contained in Doc. 33, as it seeks a determination by the Court that Anderson, Jr. was a covered resident member of the Andersons' household and therefore insured under the NHIC policy.

to meet the standard set forth in Rule 56(c). *See Celotex Corp. v.. Catrett*, 477 U.S. 317 (1986). In the Eleventh Circuit, summary judgment should only be granted where the moving party has sustained its burden of showing the absence of a genuine issue of material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *See Sweat v. Miller Brewing Co.*, 709 F.2d 665, 656 (11th Cir.1983). An issue of fact is genuine only if a reasonable jury considering the evidence presented could find for the non-moving party. Material facts are those which will affect the outcome of the trial under governing law. "[T]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *See Raske v. Dugger*, 819 F.Supp. 1046, 1052 (M.D.Fla.1993) *(citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

NHIC issued a personal automobile policy to Anderson, Sr., with effective dates from April 9, 1999 to April 9, 2000.[2] Part A of the policy provides coverage for the "Insured," defined as "You or any "family member" for the ownership, maintenance or use of any auto or "trailer." The policy defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." The policy does not define the term "resident."

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2. A copy of the policy is attached as an exhibit to Plaintiff's Motion for Summary Judgment (Doc.72) as well as to the Defendants' response (Doc.73).

Appendix B

Plaintiff contends that Anderson, Jr., was not a resident of the Andersons' household at the time of the accident on January 5, 2000, and therefore was not insured under the NHIC policy. Defendants contend that Anderson, Jr. was a resident of both a duplex on Braddock Lane, as well as the Andersons' home on Belvedere Lane, and therefore was insured under the NHIC policy at the time of the accident.

The construction and effect of a written contract are matters of law to be determined by the Court. *See Lazzara Oil Co. v. Columbia Cas. Co.*, 683 F.Supp. 777 (M.D.Fla.,1988). "Ordinary rules of construction require [the Court], first, to assess the natural or plain meaning of the policy language at issue." *Valiant Ins. Co. v. Evonosky*, 864 F.Supp. 1189, 1191 (M.D.Fla.1994)(*quoting Landress Auto Wrecking Co., Inc. v. United States Fidelity & Guaranty Co.*, 696 F.2d 1290, 1292 (11th Cir.1983)). While the NHIC policy at issue in this case does contain a definition of "family member," it does not define "residency" which is required in order for the policy to provide coverage for such family member.

The issue of residency under an insurance policy is typically a factual matter. However, when the facts are essentially undisputed, the Court may determine whether a family member is a resident as required for coverage under the policy. *See State Farm Fire and Casualty Co. v. Nickelson*, 677 So.2d 37, 38 (Fla. 1st DCA 1996); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220, 221 (Fla. 2nd DCA 1994).

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In *General Guarantee Ins. Co. v. Broxsie*, 239 So.2d 595 (Fla. 1 st DCA 1970), the Court set forth guidelines for determining residency that have been utilized by many courts in the context of automobile insurance coverage. The Court also utilizes the *Broxsie* guidelines in determining whether or not Anderson, Jr. was a resident of the Andersons' household at the time of the fatal accident of January 5, 2000.

In *Broxsie*, the First DCA stated that "[w]hat appears to distinguish a person as a resident or non-resident is that the resident is more than a mere visitor or transient, but lives at a place with additional attachments *of such significance* as to render that person a more or less *consistent part of the community.*" *Broxsie* at 597 (emphasis added). The *Broxsie* court identified three important considerations in determining residency: 1) close ties of kinship; 2) a fixed dwelling unit; and 3) enjoyment of each part of the living facilities. *Id.*.

The *Broxsie* also court noted that the residence of a party is a matter of both fact and intention, so it is important to consider the intent of the parties in making a residency determination. *Id* . (citation omitted). The issue of whether or not a person "lives at a place with no present intention of removing therefrom" is question that must be answered looking at the facts of the particular case. *Id.* (citations omitted). The Broxsie court also observed that the term "resident of the same household" is ambiguous as employed by automobile insurance policies and "should be considered in its most inclusive sense." *Id.* (citation omitted).

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The Court has reviewed all the deposition testimony submitted, including that of Anderson, Jr., Anderson, Sr., and Christine Anderson, as well as the affidavit of Donna Reid Lunsford (Reid Affidavit), and finds that the essential material facts surrounding the issue of residency of Anderson, Jr. at the time of the accident are undisputed.[3] To the extent that facts are disputed, the Court notes them, views them in the light most favorable to the Defendants, and finds that they are not material, in that they would not support a reasonable jury finding in favor of the Defendants. The Court summarizes the facts below.

Anderson, Jr. lived at the Braddock Lane duplex for at least eight months prior to the accident.[4] The duplex and the Andersons' single family home on Belvedere Lane were separate residences on different streets and not a "fixed dwelling unit[5]."

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3. Citations to the record for the undisputed facts can be found in Plaintiff's Motion for Summary Judgment (Doc.72), pp. 5-12.

4. Since approximately age 18, Anderson, Jr. had moved in and out of his parents' home several times before moving to the Braddock duplex in April 1999, and also stayed there after the accident to recuperate from his injuries. Anderson, Jr.'s intent was to live on his own, but various circumstances had him return to live with his parents until he could re-establish his own residence. *See e.g.*, Depo. of Anderson, Jr., at p. 88; Depo. of Christine Anderson, at pp. 29-30.

5. The Court views the term "fixed dwelling unit" in its most inclusive sense, recognizing that, for the purposes of

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insurance coverage, Florida court determinations of residency since *Broxsie* have not imposed a hardline rule requiring that the proposed resident actually reside in the same physical dwelling household as the named insureds, that is, Florida courts have found that a person may be a "dual resident" of both the named insured's household and a separate dwelling. However, for the reasons stated in this opinion, the Court finds that the facts in this case are clearly distinguishable from those cases where Florida courts have found residency despite separate dwelling units, and do not support a finding in this case that Anderson, Jr. was a resident of the Andersons' household. *Cf, e.g., Dwelle v. State Farm Mutual Automobile Insurance Company*, 839 So.2d 897 (Fla. 1 st DCA 2003)(at time of accident the named insured's son was a full-time college student, physically residing with his parents at his parents' home at the time of the accident, parents were intended sole source of financial support, son had not abandoned his parents' home, and parents claimed son as a dependant on their tax returns); *Seitlin & Co. v. Phoenix Insurance Co.*, 650 So.2d 624 (Fla. 3rd DCA 1994) (holding son, a full-time student, covered under parents' homeowners policy where son treated parents' home as permanent residence, maintained room and possessions at parents' home, and parents were *sole* financial support.); *Kepple v. Aetna Casualty and Surety Co.*, 634 So.2d 220 (Fla. 2nd DCA 1994) (holding daughter entitled to uninsured motorist coverage as a resident of parents' household where daughter and husband resided in enclosed carport attached to parents' home and had free access to parents' home with no separate utilities, address, or mailbox); *Alava v. Allstate Insurance Co.*, 497 So.2d 1286 (Fla. 3rd DCA 1986) (holding son of divorced parents a resident of both households where son spent significant time in both mother's and father's households and clear intent of parents that son maintain relationship with

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Anderson, Jr. shared the Braddock Lane duplex with various roommates. Though there was no written lease, the Andersons, who owned the duplex, charged Anderson, Jr. and his roommates $600 per month for the "B" side of the duplex, where they lived. All utilities were the responsibility of Anderson, Jr. and his roommates. The electric bill was in the name of Anderson, Jr., and Anderson, Jr. was responsible for all of his own personal bills, including utilities and groceries.

The record is disputed about whether Anderson, Jr. consistently paid his full share of the rent. For purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that Anderson, Jr. sometimes paid his full rental share, sometimes made a partial rental payment, and sometimes did not pay anything toward his share, depending on his employment status. The record is undisputed, however, that he was supposed to be paying rent to his parents to live at the Braddock duplex and that he was never threatened with eviction for any partial or non-payment.

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both parents); *Row v. United States Automobile Association*, 474 So.2d 348 (Fla. 1 st DCA 1985)(apartment complex owned by father was considered "family dwelling" for mentally ill son and other siblings, even though son slept in a separate apartment where son relied on father for emotional and financial support, son used father's apartment for everything except sleeping so was no mere visitor or transient, and there was no evidence of father's or son's intent at the time of the accident for son's living arrangements to change.).

His parents only occasionally visited Anderson, Jr. at the Braddock Lane duplex. The frequency of Anderson, Jr.'s visits to his parents' home on Belvedere Lane is disputed, ranging from an estimate of several times a week to sometimes no visits for weeks at time. Again, for purposes of ruling on Plaintiff's Motion for Summary Judgment, the Court assumes that a jury could find that Anderson, Jr. visited the Andersons' home several times each week.

At the time of the fatal accident, Anderson, Jr. did not have a key to the Andersons' home, did not have a bedroom at the Andersons' home nor would one have been available for his use, and rarely, if ever, spent the night there.[6] Some of his personal items were stored in boxes in the garage. When he visited his parents' home, Anderson, Jr. was permitted to help himself to the contents of the refrigerator and he sometimes dined there with family members. Despite various conflicting statements, the Court also assumes that a jury could find that while he visited his parents' home, he also watched television, used the swimming pool, and sometimes helped with some chores around the house.

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6. In their response to Plaintiff's Motion for Summary Judgment (Doc.73), the Defendants assert that Donna Reid Lunsford's affidavit supports the fact that Anderson, Jr. sometimes slept in a recreational vehicle that was parked at the Andersons' Belvedere Lane home. The Court finds no such statement in her affidavit. Christine Anderson stated that she was not aware of Anderson, Jr. ever sleeping in the recreational vehicle. Depo. of Christine Anderson at p. 78.

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The deposition testimony of Anderson, Jr., Anderson, Sr., and Christine Anderson regarding their intent as to the residency of Anderson, Jr. is unanimous and uncontroverted in the record. Anderson, Jr. stated that he considered the Braddock Lane duplex his home and that even before moving there he only stayed at his parents' Belvedere Lane home temporarily pending his ability to establish his home elsewhere.[7] *See e.g.* Depo. of Anderson, Jr. at pp. 36, ll 8-10, pp. 71-72 and 88.

When Anderson, Jr. moved into the Braddock Lane duplex in April of 1999, and throughout the course of his residency at the duplex, Anderson, Sr. offered no financial support. Christine Anderson, his mother, sometimes on a weekly basis, would give or loan Anderson, Jr. "ten or twenty bucks here and there." Christine Anderson also never threatened to evict Anderson, Jr. for partial or nonpayment of rent.[8] The Andersons expected Anderson, Jr. to support himself and had no intention of having Anderson, Jr. return to

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7. The Defendants cite as evidence that Anderson, Jr. was a resident of the Andersons' Belvedere Lane address the ambulance report for Anderson, Jr. on the date of the fatal accident which shows Belvedere Lane as his address. Doc. 73, Exh. 9. The Court finds that this document is not probative of Anderson, Jr.'s residency because there is no indication of who provided the information contained in the report. Moreover, the report states that Anderson, Jr. was ejected from his vehicle, sustained multiple injuries, and his verbal ability was "confused."

8. She also provided money to post $10,000 bail when Anderson, Jr. was arrested in September 1999.

their household on a permanent basis.[9] *See e.g.* Depo. of Christine Anderson at pp. 29-30; Depo. of Anderson, Sr. at pp. 11, 24 and 31.

In addition, Anderson, Jr. did not have keys to any of the Andersons' vehicles.[10] Anderson, Sr. did not intend that Anderson, Jr. be insured under the NHIC policy.[11] *See e.g.* Depo. of Christine Anderson at pp. 26 and 28; Depo. of Anderson, Sr. at p. 23. When Anderson, Jr. moved into the Braddock duplex in April 1999,[12] he maintained his own insurance policy on his own vehicle, an Acura.[13] Moreover,

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9. In fact, according to Donna Reid Lunsford, Christine Anderson said that she was tired of supporting her son. Reid Affidavit.

10. Donna Reid Lunsford claims to have seen Anderson, Jr. drive one of the Andersons' vehicles and Anderson, Jr. stated he drove his mother's vehicle approximately three times. Depo. of Anderson, Jr. at p. 33. Assuming this is true, such evidence is insufficient, in light of the record before the Court to permit a jury to find that Anderson, Jr. was a resident of the Andersons' household.

11. In fact, the first time Anderson, Jr. moved out of his parents' home when he was approximately 18 years old, Christine Anderson filled out paperwork with their automobile insurance company at that time to remove him from the policy because he was no longer living in their household. Depo. of Christine Anderson at pp. 28 and 65.

12. The NHIC policy became effective April 9, 1999, the same month that Anderson, Jr. moved into the duplex.

13. Anderson subsequently relinquished possession of the Acura for failure to make his car payments, and his insurance lapsed for non-payment. This occurred before the accident.

the Andersons did not claim Anderson, Jr. as a dependant on their 1999 or 2000 Federal Tax Returns.

This Court is of the opinion that the nature of Anderson, Jr.'s visits to his parents' home and other contacts with them evidence strong bonds of kinship, but do not rise to the level of enjoyment of each part of the living facilities as contemplated by the *Broxsie* and other courts when determining residency in the insurance context. Likewise, the financial and other support that the Andersons provided does not rise to the level of sole support or dependency to establish that he or they had the present intention that he reside in their Belvedere home, but rather evidences the contrary intent by all parties that he maintain a separate residence apart from his parents at the Braddock Lane duplex. The financial and other support[14] he received from his parents in fact enabled Anderson, Jr. to continue to maintain his residence outside his parents' home and not become a consistent part of the community of the Andersons' Belvedere Lane home. Viewing all of the evidence in the light most favorable to the Defendants, the Court concludes that the financial support and contacts are best characterized as evidencing strong bonds of kinship, rather than any present intent to reside with his parents. The Court is of the opinion that on the record before the Court, a

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14. In addition to the support the Court has described, such support could also include Christine Anderson doing Anderson, Jr.'s laundry, as claimed by Donna Reid Lunsford and disputed by other testimony, but that would not change the Court's conclusion.

reasonable jury could only reach the conclusion that Anderson, Jr. was a visitor or transient with regard to the Andersons' household, and that he did not have significant additional attachments which would render him a consistent part of the household community as contemplated by *Broxsie*. Anderson, Jr. had not resided there with "no present intention of removing therefrom" (Broxsie at 597) for at least eight months prior to the accident, and neither he nor his parents had any present intent that he return to the Anderson household at the time of the accident.

Therefore, NHIC is entitled to a determination as a matter of law that Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and as a result is not covered under the NHIC policy; and further, based on the foregoing, the Court will grant summary judgment as a matter of law in favor of the Plaintiff. Accordingly, it is

ORDERED AND ADJUDGED:

1. That Plaintiff's Motion for Summary Judgment (Doc.72) is granted and the Court determines that Jeffrey Bruce Anderson, Jr. was not a resident of the named insured's household at the time of the January 5, 2000 accident, and therefore is not covered under the NHIC policy; and

2. That entry of Final Judgment is hereby deferred pending Plaintiff's written notification to the Court by February 26, 2007, regarding the status and

proposed disposition of the case regarding the remaining three Defendants who have not appeared in this case: John P. Merlino, Jeffrey Bruce Anderson, Jr., and Juan Quiles, III.

DONE AND ORDERED this 7th day of February 2007.

s/ Howell W. Melton
HOWELL W. MELTON
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 19, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-11731-BB

NEW HAMPSHIRE INDEMNITY COMPANY, INC.,

Plaintiff-Counter-Defendant-Appellee,

versus

DONNA REID, as Personal Representative of the Estate of Jonathan Merlino, deceased, HELEN KEARNS, as Personal Representative of the Estate of Eric Scott Kearns, deceased,

Defendants-Counter-Claimants-Appellants.

BEFORE: ANDERSON, BARKETT and HILL, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellants is DENIED.

ENTERED FOR THE COURT:

s/ Rosey Barkett
UNITED STATES CIRCUIT JUDGE